

# NOTES

## RELYING ON THE UNRELIABLE: CHALLENGING USCIS'S USE OF POLICE REPORTS AND ARREST RECORDS IN AFFIRMATIVE IMMIGRATION PROCEEDINGS

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*Although many scholars have recognized the need for increased procedural protections for immigrants in removal proceedings, very little attention has been paid to the process afforded to immigrants applying affirmatively to acquire lawful status. However, due to the collection of important interests implicated by affirmative immigration proceedings, procedure still matters even if deportation is not immediately at stake. This Note helps to fill the scholarly gap by discussing a relatively recent phenomenon in affirmative immigration practice: U.S. Citizenship and Immigration Services' requests for and reliance on police reports, arrest records, and other documents underlying any contact an applicant has had with the criminal justice system, even when the charges were ultimately dropped or the applicant was acquitted. This practice is particularly problematic in light of the unreliability of these documents, the role they play in the adjudication of applications, and the difficulty applicants face in appealing unfavorable decisions. Thus, this Note argues that not only is USCIS's policy unlawful under the Administrative Procedure Act, but it also violates the guarantee of Due Process provided by the Fifth Amendment of the Constitution.*

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INTRODUCTION

Jessica<sup>1</sup> is a victim of domestic violence. After suffering years of abuse by her husband, one day she finally decided to call the police after an attack. While waiting for the police to arrive, her husband continued to threaten and menace her. As he approached her, Jessica held up a cooking knife in self-defense, in order to convince her husband to back away until the police arrived. When they did arrive, however, her husband told the officers that Jessica was the aggressor and had been threatening *him*. The police arrested Jessica, although ultimately the charges against her were dismissed.

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<sup>1</sup> Name changed for anonymity. Jessica’s story is based on the facts of a client at Her Justice, an immigrant advocacy organization in New York City where the author worked as a law student intern. Thank you to Timothy Fallon, attorney at Her Justice, for providing me with this anecdote.

Eventually, Jessica sought legal help and was able to obtain a U-visa, which is available for “victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.”<sup>2</sup> She disclosed the incident with the police and her husband’s false accusations against her at the time she applied for her U-visa.

After receiving her visa, Jessica once again found herself the victim of harassment, this time on the street by a neighbor. She sought to defend herself, but when the police were called, the neighbor, like Jessica’s husband, told the police that Jessica was the aggressor, and Jessica was arrested. Once again, after the police investigated, the charges against her were dismissed.

Jessica recently applied to become a lawful permanent resident.<sup>3</sup> However, she was quickly distressed to learn that United States Citizenship and Immigration Services (USCIS)—the agency responsible for processing immigration applications—was considering her two arrests as negative evidence against her. Even though Jessica was the victim in both situations and neither arrest led to a conviction, the agency requested that she send it all of the arrest reports and information pertaining to her alleged conduct. Before Jessica and her attorney were even able to secure the requested reports from the police, USCIS denied her application for adjustment in an “exercise of discretion.”<sup>4</sup>

Jessica’s story is an example of a relatively recent, disturbing phenomenon in the affirmative immigration context.<sup>5</sup> More and more frequently, USCIS asks immigration applicants—primarily for visas and adjustments of status—to provide information underlying all contact a petitioner has had with the criminal justice system, regardless of whether that contact led to a conviction for a crime.<sup>6</sup> These requests

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<sup>2</sup> *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last updated June 12, 2018).

<sup>3</sup> Lawful permanent residents, known colloquially as “‘green card’ holders,” are “non-citizens who are lawfully authorized to live permanently within the United States.” *Lawful Permanent Residents (LPR)*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/lawful-permanent-residents> (last updated Oct. 22, 2020). The process to apply for a green card is called adjustment of status.

<sup>4</sup> Her case is now on appeal to the USCIS Administrative Appeals Office (AAO).

<sup>5</sup> The affirmative immigration context is the process by which immigrants who are proactively seeking to enter or remain in the United States legally (as opposed to defending themselves against removal or deportation) must proceed. *See infra* notes 21–25 and accompanying text.

<sup>6</sup> The author was first made aware of this trend while working as a student intern at Her Justice. Several practice advisories directed at immigration practitioners have highlighted the problem. *See, e.g.*, Practice Advisory, Cath. Legal Immigr. Network, Inc.,

are accomplished through the issuance of a Request for Evidence (RFE), following a petitioner's initial application to the agency.<sup>7</sup> An RFE reflecting this trend might ask for "original or certified copies" of the "[a]ctual arresting officer's report of the arrest" and the corresponding "[c]riminal complaint or charging document."<sup>8</sup> USCIS is increasingly not satisfied, as it had been in the past, by the applicant's submittal of the relevant certificates of disposition (documents that state the ultimate outcome for a specific charge, e.g. "dismissed" or "convicted"). Instead, the agency's current approach is to base its decisions on a more holistic review of the underlying "facts" of particular arrests, as recorded in police reports and charging documents.<sup>9</sup>

This shift in USCIS policy regarding the types of documents it considers when making visa and adjustment of status determinations has occurred alongside the agency's increased involvement in deportation proceedings. As part of the increased immigration enforcement policy that began under the Trump administration,<sup>10</sup> USCIS now goes beyond its charge of "providing the 'service' of administering the lawful immigration system" and has taken on more of an enforcement role.<sup>11</sup> For example, on June 28, 2018, USCIS updated its guidelines

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Requests for Arrest Reports in Immigration Matters (July 29, 2019) (on file with author); Memorandum, Sanctuary for Fams., VSC Requests for Copies of Police Reports Detailing Arrests (June 2, 2017) (on file with author). For a recent case challenging the practice, see *Ashfaque v. Barr*, 793 F. App'x 517 (9th Cir. 2019).

<sup>7</sup> It is important to note that initial applications are nearly always accompanied by significant documentation supporting the petitioner's application. RFEs are only issued where USCIS determines that it needs *more* evidence in order to process the application. See 7 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL pt. A, ch. 4(c) (2020), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-4>.

<sup>8</sup> U.S. Citizenship & Immigr. Servs., Request for Evidence re I-485 (Application to Register Permanent Residence or Adjust Status) (July 2019) (on file with author).

<sup>9</sup> See *supra* note 6 and accompanying text.

<sup>10</sup> See, e.g., RANDY CAPPS, MUZAFFAR CHISHTI, JULIA GELATT, JESSICA BOLTER & ARIEL G. RUIZ SOTO, MIGRATION POL'Y INST., REVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP 1 (2018), [https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationEnforcement-FullReport\\_FINALWEB.pdf](https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationEnforcement-FullReport_FINALWEB.pdf) (describing a "sea change" in interior immigration enforcement between the final years of the Obama administration and the first years of the Trump administration); Emily Ryo, *How ICE Enforcement Has Changed Under the Trump Administration*, CONVERSATION (July 29, 2019, 8:25 AM), <https://theconversation.com/how-ice-enforcement-has-changed-under-the-trump-administration-120322> (describing shifts in immigration enforcement since Trump took office). Importantly, even if a future president reverses the Trump administration's policies, without legal and constitutional limits imposed by the courts, nothing prevents subsequent executives from returning to similar policies. See *infra* Section III.C.

<sup>11</sup> See Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707, 709, 710–11 ("USCIS has dramatically increased its enforcement functions within its adjudication mission, thereby fortifying a pipeline from application to apprehension, detention, and deportation.").

for how it issues Notices to Appear (NTAs),<sup>12</sup> the documents that serve as the beginning of deportation proceedings.<sup>13</sup> While in the past USCIS very rarely issued NTAs (because ICE is primarily responsible for deportation, not USCIS),<sup>14</sup> the June 2018 guidelines explain that USCIS now takes an active role in initiating deportation proceedings.<sup>15</sup> Reflecting this change, the USCIS memo states that one of the categories of immigrants for which it will begin issuing NTAs is “Aliens Not Lawfully Present in the United States or Subject to Other Grounds of Removability.”<sup>16</sup> An immigrant falls into this category if, “upon issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States.”<sup>17</sup> In other words, the government has created a fast track from denial of a visa or adjustment of status to deportation.<sup>18</sup>

When USCIS’s increased involvement in deportation is considered alongside its greater reliance on a broader range of documents underlying immigration petitioners’ applications, a problem emerges. Previously, an immigrant was unlikely to face removal based on the unsubstantiated “facts” contained in a police report or charging document, especially when the arrest or charge never led to a criminal conviction. Now in an increasing number of cases, USCIS is using those “facts” to deny applications for visas and adjustments of status, and then using its denial to begin removal proceedings against those same applicants. Even for those applicants who do not face the immediate threat of deportation as a consequence of a USCIS application denial, their inability to gain lawful immigration status can have serious col-

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<sup>12</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0050.1, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (2018) [hereinafter USCIS POLICY MEMORANDUM], <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

<sup>13</sup> See Minyoung Ohm, *USCIS Issues a New NTA Policy Guidance*, CATH. LEGAL IMMIGR. NETWORK, INC. (Aug. 8, 2018), <https://cliniclegal.org/resources/uscis-issues-new-nta-policy-guidance> (“NTA orders the person to appear before an immigration judge on a given date and to undergo the removal proceedings in court.”).

<sup>14</sup> *Id.*

<sup>15</sup> See USCIS POLICY MEMORANDUM, *supra* note 12, at 3–8 (listing six broad categories of immigrants for whom USCIS will begin to issue NTAs in accordance with immigration enforcement priorities).

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.*

<sup>18</sup> For a description of how this new policy plays out in reality, see Stuart Anderson, *New USCIS Policy Will Carry Harsh Consequences for Applicants*, FORBES (July 11, 2018, 12:15 AM), <https://www.forbes.com/sites/stuartanderson/2018/07/11/new-uscis-policy-will-carry-harsh-consequences-for-applicants> (describing the consequences of being simultaneously denied a visa and issued an NTA under the new policy).

lateral consequences, leading to increased vulnerability in many aspects of their lives.<sup>19</sup>

While many scholars have argued that increased procedural protections are needed in deportation proceedings,<sup>20</sup> this Note argues that USCIS's policy highlights the need for increased protections in the affirmative immigration context as well. Part I grounds the problem by explaining the role of affirmative proceedings in the immigration framework and why procedural protections are important in the affirmative context. Next, Part II demonstrates more specifically why USCIS's policy is problematic, by explaining why police reports and arrest records are generally unreliable and describing how these documents are used in other contexts. Part III then argues that USCIS's policy can be successfully challenged both under the Administrative Procedure Act as well as the Due Process Clause of the Fifth Amendment.

## I

### GREATER PROTECTION IS NEEDED IN THE AFFIRMATIVE IMMIGRATION CONTEXT

USCIS, a division of the Department of Homeland Security, is responsible for affirmative immigration proceedings: It processes applications for visas, work permits, green cards, naturalization, and other types of immigration statuses.<sup>21</sup> In other words, immigrants who are proactively seeking to enter or remain in the United States legally must find a pathway through USCIS. In contrast, ICE manages removal—i.e. deportation—proceedings in which the government tries to remove immigrants from the country.<sup>22</sup>

The Immigration and Nationality Act (INA) governs the immigration framework.<sup>23</sup> During any affirmative immigration proceeding, an applicant submits documentation in support of her application to USCIS showing that she meets the statutory requirements set forth in the INA.<sup>24</sup> While the INA lays out many detailed mandatory requirements and procedures, there are also specific provisions which grant either the Secretary of Homeland Security or the Attorney General

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<sup>19</sup> See *infra* notes 32–37 and accompanying text.

<sup>20</sup> See *infra* note 28.

<sup>21</sup> See *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/what-we-do> (last updated Feb. 27, 2020).

<sup>22</sup> See *Who We Are*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/about> (last updated May 13, 2020).

<sup>23</sup> See 8 U.S.C. § 1101.

<sup>24</sup> See *generally Explore My Options*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://my.uscis.gov/exploremyoptions> (last visited Nov. 11, 2020) (explaining application processes for different immigration statuses and benefits).

discretion in carrying out the law<sup>25</sup>—discretion which is ultimately passed on to USCIS, as the agency that implements the immigration laws on the ground. Thus, USCIS may request that applicants submit additional documentation if the agency determines that it needs more information in order to make its decision.<sup>26</sup>

Because no statutory provision explicitly requires USCIS to request or rely on police reports or arrest records, it presumably requests those documents and denies applications based on them under the authority of the agency's residual discretion. Unfortunately, due to the vast array of possible immigration statuses that USCIS handles, as well as the lack of statistical data regarding how and why USCIS denies various applications, it is impossible to describe with precision the number and type of applications that USCIS has denied based on information contained in police reports and arrest records. However, evidence from practitioners suggests that the policy has widespread effects.<sup>27</sup>

Many commentators have noted the troubling lack of procedural protections for immigrants in removal proceedings.<sup>28</sup> Very little has been written, however, regarding procedural protections in the non-

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<sup>25</sup> Of particular relevance for this Note: section 245 of the INA gives the Attorney General the authority to adjust the status of certain immigrants to lawfully admitted for permanent residence “in his discretion and under such regulations as he may prescribe,” 8 U.S.C. § 1255(a); section 204 states that the Attorney General has “sole discretion” to determine which evidence is credible and the weight it should be given when acting upon certain petitions for immigrant status, 8 U.S.C. § 1154(a)(1)(J); and section 212 grants the Attorney General “sole discretion” to waive certain grounds of inadmissibility if the petitioner meets specified requirements, 8 U.S.C. § 1182(a)(9)(B)(v).

<sup>26</sup> See 8 C.F.R. § 103.2(b)(8) (2020) (providing that USCIS may request additional evidence if it determines that the evidence initially submitted with an application does not establish eligibility).

<sup>27</sup> See *supra* note 6 and accompanying text. At least one immigrant advocacy organization is planning to pursue Freedom of Information Act (FOIA) litigation in order to better understand how USCIS has been using police reports and arrest records in the U-visa context, specifically. See E-mail from Gail Pendleton, Exec. Dir., ASISTA Immigr. Assistance, to author (Oct. 15, 2019, 12:53 PM EST) (on file with author).

<sup>28</sup> See, e.g., AM. IMMIGR. COUNCIL, *TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE* (2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aic\\_twosystemsofjustice.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf) (outlining the various ways that the protections offered in the criminal justice and immigration systems diverge and advocating for greater protections in the immigration context); Lilibet Artola, Note, *In Search of Uniformity: Applying the Federal Rules of Evidence in Immigration Removal Proceedings*, 64 RUTGERS L. REV. 863 (2012) (advocating for the incorporation of the Federal Rules of Evidence in removal proceedings); Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675 (2015) (arguing that the right to confrontation should apply in removal proceedings); Elizabeth A. Rossi, *Revisiting INS v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013) (arguing for greater evidentiary protections in deportation proceedings, particularly application of the exclusionary rule).

adversarial, affirmative immigration context.<sup>29</sup> Nevertheless, procedure matters just as much at the affirmative application stage of the immigration process as it does once an immigrant has formally been placed in removal proceedings.

### A. *Significance of Affirmative Proceedings*

First, additional procedural protections to limit or eliminate USCIS's use of documents underlying criminal records are needed since reliance on such documents may impact individual immigrants' cases in significant ways. While there is currently no data available on the number of applications USCIS has denied based on information collected from police reports or arrest records,<sup>30</sup> USCIS is likely using information contained in those documents in the context of decisions that involve an exercise of discretion, such as adjustment of status for lawful permanent residency.<sup>31</sup> Thus, under the auspices of an exercise of discretion, a USCIS officer might deny an application based on unfavorable information contained in a police report or arrest record, regardless of whether the charges were later sustained.

A USCIS denial could have a range of consequences. The least severe result would be that the denied applicant becomes vulnerable to further collateral consequences. For example, she might begin accruing "unlawful presence"—time spent in the United States without legal status—which will make it more difficult for her to obtain lawful status in the future.<sup>32</sup> In addition, the ability to work lawfully in the United States is dependent on immigration status.<sup>33</sup> Denial of an immigration application can also lead to the loss of access to critical government assistance,<sup>34</sup> and the ability to travel

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<sup>29</sup> However, Beth K. Zilberman recently analyzed the nature of USCIS field office interviews and argued that greater procedural protections are needed in that context. See Zilberman, *supra* note 11.

<sup>30</sup> See *supra* note 27 and accompanying text.

<sup>31</sup> See 8 U.S.C. § 1255(a).

<sup>32</sup> See *Unlawful Presence and Bars to Admissibility*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/legal-resources/unlawful-presence-and-bars-admissibility> (last updated July 23, 2020) (explaining unlawful presence, how it is accrued, and its consequences).

<sup>33</sup> See *Working in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-us> (last visited Nov. 11, 2020) (explaining the various ways an immigrant can be granted authorization to work in the United States).

<sup>34</sup> Receipt of most federal welfare benefits is dependent on obtaining a "qualified" immigration status. See TANYA BRODER, AVIDEH MOUSSAVIAN & JONATHAN BLAZER, NAT'L IMMIGR. L. CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 2 (2015), <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf> (detailing which statuses are "qualified" for welfare purposes).



freely and easily is dependent on immigration status.<sup>35</sup> Most seriously, a USCIS denial can ultimately lead to deportation now that USCIS has begun referring more cases to ICE to initiate removal proceedings.<sup>36</sup> While the many individualized factors involved<sup>37</sup> make it difficult to pinpoint with certainty the likelihood of any of these specific outcomes, a USCIS denial always leads to increased vulnerability.

### B. *Ability to Appeal*

Unlike many other administrative benefit determinations, the opportunities to contest and appeal a denial of an immigration application are extremely limited. For example, while a welfare recipient has a right to a hearing prior to termination of benefits, and may continue to contest the welfare agency's determination in federal court,<sup>38</sup> not all USCIS decisions are appealable.<sup>39</sup> For those decisions that *can* be appealed, most appeals go through the Administrative Appeals Office (AAO), which is a division of USCIS.<sup>40</sup> However, unlike a typical case in state or federal court, AAO determinations are most often issued as non-precedential decisions, which means they apply only to the specific appellant involved, but "do not create or modify USCIS policy or practice."<sup>41</sup> Therefore, even if the AAO has determined once or many times that a certain USCIS practice, like requesting police reports and arrest records and relying on them to make decisions, is unlawful or misaligned with agency policy, USCIS field offices are under no obligation to consider those AAO decisions when processing future applications. In other words, the problem can continue.<sup>42</sup>

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<sup>35</sup> See *Know Your Rights!*, IMMIGR. EQUAL., <https://immigrationequality.org/legal/legal-help/resources/know-your-rights> (last updated June 3, 2020) (warning that "if you are not in valid immigration status, or if you have a pending application for immigration status, you should not travel abroad" and "for those [immigrants] who are not in valid status, or who have applications pending, even domestic travel is risky").

<sup>36</sup> See *supra* notes 12–18 and accompanying text.

<sup>37</sup> Such factors include applicants' immigration status at the time they applied, the type of status they were applying for, their family members' immigration statuses, their access to counsel, etc.

<sup>38</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (establishing that welfare recipients have a Due Process right to an evidentiary hearing prior to termination of benefits).

<sup>39</sup> See U.S. CITIZENSHIP & IMMIGR. SERVS., AAO PRACTICE MANUAL § 3.2 JURISDICTION (2018), <https://www.uscis.gov/aao-practice-manual>.

<sup>40</sup> *Id.* §§ 1.2 AAO OVERVIEW, 1.4(a) JURISDICTION AND TYPES OF CASES. A small minority of decisions are appealable to the Board of Immigration Appeals (BIA) within the Department of Justice. *Id.* § 1.6 THE BOARD OF IMMIGRATION APPEALS.

<sup>41</sup> *Id.* § 3.1 OVERVIEW.

<sup>42</sup> AAO decisions can become binding on future applications, but only if the Secretary of Homeland Security, with the Attorney General's approval, designates the decision as precedent. See *id.* § 3.15(c) NON-PRECEDENT, ADOPTED AND PRECEDENT DECISIONS.

In theory, immigrants seeking to challenge a USCIS determination could also seek review in federal court.<sup>43</sup> However, for those immigrants whose petitions were denied as a result of a discretionary determination, the government takes the position that the INA's jurisdiction-stripping provisions preclude most forms of judicial review. These jurisdiction-stripping provisions are discussed at length in Part III,<sup>44</sup> but their practical effect may be to remove a large number of immigration decisions from Article III review. Even for claims that are reviewable, district courts' scope of review is narrow and agency decisions are afforded considerable deference.<sup>45</sup>

### C. *Lack of Neutral Decisionmaker*

In addition, the very fact that affirmative immigration proceedings are purportedly “non-adversarial” raises concerns about their lack of procedural protections because the label obfuscates the true nature of those proceedings.<sup>46</sup> It is true that on its face, the USCIS process of obtaining legal status—be it a green card, a visa, or naturalization—appears to be more like applying for a driver's license than an adversarial legal dispute. In a typical adjustment of status case, for example, a petitioner fills out a standardized form, provides supporting documentation (including fingerprints and a photograph), interviews with a USCIS representative, and then waits for USCIS to approve or deny her application.<sup>47</sup> By contrast, removal proceedings more closely resemble a criminal trial: Immigrants are confronted

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<sup>43</sup> Federal district courts have subject matter jurisdiction over questions originating under federal immigration law. *See* AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON & DANIEL MONTALVO, PRACTISING L. INST., FRAGOMEN ON IMMIGRATION FUNDAMENTALS § 8:6.1 JURISDICTIONAL BASIS (5th ed. rev. 2020). The most typical method for challenging USCIS decisions in federal district court is to raise an Administrative Procedure Act (APA) claim. *See, e.g.,* Lee v. U.S. Citizenship & Immigr. Servs., 592 F.3d 612, 614 (4th Cir. 2010).

<sup>44</sup> *See infra* Section III.A.2.

<sup>45</sup> *See, e.g.,* Soni v. United States, No. 11-2431, 2016 WL 4154137 (D.N.J. Aug. 2, 2016). In reviewing USCIS's decision to deny a petition, the court stated that its standard of review “is a narrow one,” *id.* at \*3 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974)), and it should not “substitute its judgment for that of the agency,” *id.* (quoting Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

<sup>46</sup> For a more thorough analysis and discussion of the “non-adversarial” nature of USCIS as administrative adjudicator, see generally Zilberman, *supra* note 11, at 765 (arguing that, at least in the context of USCIS field office interviews, to call the proceedings “non-adversarial” is “imprecise at best and deceptive at worst”).

<sup>47</sup> *See Adjustment of Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/greencard/adjustment-of-status> (last updated Sept. 25, 2020).

with the case against them and have the opportunity to respond and offer a defense.<sup>48</sup>

In many ways, however, the affirmative immigration process is also adversarial. In theory, an “indifferent” agency decides whether a petitioner applying for affirmative immigration relief has met the relevant requirements without the presence of an adverse counterparty. But in reality, there is no neutral tribunal overseeing each step of the affirmative immigration process, and the ultimate decision to affirm or deny an application is not made by an impartial finder-of-fact, but instead by an interested party: an executive agency. By its nature as part of the executive branch, USCIS follows the lead of whatever party is in office, as well as that party’s immigration enforcement priorities.<sup>49</sup> Therefore, the “indifferent” arbiter of affirmative immigration applications is more like an adverse party while also remaining the ultimate decisionmaker.<sup>50</sup> As Beth Zilberman has argued, USCIS adjudicators’ placement within a policy-making agency, coupled with USCIS’s increased involvement with immigration enforcement, “raises significant adjudicator impartiality concerns.”<sup>51</sup> This lack of neutrality is made more significant by the fact that many affirmative immigration decisions involve an exercise of agency discretion,<sup>52</sup> and there are very limited avenues for appealing those decisions.<sup>53</sup>

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<sup>48</sup> See 8 U.S.C. § 1229a(b)(4)(B) (requiring, in removal proceedings, that “the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government”). But see Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183–84 (2017) (contending that reform proposals primarily based on critiques of immigration adjudication are misplaced because they fail to account for the fact that the vast majority of persons ordered removed never step foot inside a courtroom, and even cases filed with the immigration courts often result in a substantial number of removal orders without adjudication of the merits); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 515–18 (2007) (describing the ways that civil immigration removal proceedings continue to lack the procedural protections of criminal proceedings, including constitutional protections like the right to a jury trial and the right to counsel and the difficulties in achieving Article III review).

<sup>49</sup> See Zilberman, *supra* note 11, at 732–34 (describing USCIS’s recent ideological shifts); *id.* at 749–53 (providing evidence that USCIS officials’ interests diverge from and are potentially hostile to affirmative immigration applicants).

<sup>50</sup> See *id.* at 722 (“Adjudicators within policymaking agencies present bias concerns relating to the pressures imposed to fulfill policy aims.”); see also León Rodríguez, *The Trump Administration Is Making Legal Immigration Harder, Too*, WASH. POST (July 29, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/07/29/trump-administration-is-making-legal-immigration-harder-too> (explaining changes to processing of immigration applications at USCIS which reflect administration priorities).

<sup>51</sup> Zilberman, *supra* note 11, at 748.

<sup>52</sup> See *supra* note 25 and accompanying text.

<sup>53</sup> See *supra* notes 38–45 and accompanying text.

Scholars have raised additional arguments regarding the significance of procedures in the affirmative immigration context.<sup>54</sup> This Part has demonstrated that the affirmative immigration process differs in significant respects from other civil administrative benefit determinations with regard to the interests at stake, the ability to appeal, and the partisan nature of the process, which makes the procedure used by USCIS all the more important.

## II

### USCIS'S POLICY RELIES ON ARBITRARY BAROMETERS

The problem with USCIS's reliance on police reports and arrest records—rather than limiting its consideration to dispositive information like records of conviction—to make conclusions about applicants' eligibility for immigration status is that these types of records are not inherently reliable, which is well-recognized in other contexts. Therefore, it is all the more troubling that USCIS relies increasingly on these documents when considering immigrants' applications for affirmative relief without additional procedural safeguards. This Part explores the unreliability of these documents first by examining their inherent tendencies toward inaccuracy and unreliability, and then by explaining how the documents have been critiqued in other contexts.

#### A. General Unreliability

As the Supreme Court succinctly stated in *Schware v. Board of Bar Examiners*, “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone prob-

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<sup>54</sup> For example, Kevin Lapp has persuasively argued that the good moral character requirement for naturalization undermines social cohesion by subordinating and marginalizing those legal permanent residents who are prevented from accessing citizenship based on their criminal histories. Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1614–19 (2012). In particular, “an exclusionary membership policy with respect to individuals who permanently reside in the country and who participate daily in the community’s social and economic spheres serves only to subordinate and marginalize.” *Id.* at 1616. Similar arguments could be made with regards to the differential treatment shown to citizens and immigrants facing uncorroborated accusations of criminal conduct. For example, “the character bar to citizenship does no protective work with respect to the community . . . . [T]here is already in place a system to address law breaking: the criminal justice system.” *Id.* at 1618. Neither does USCIS’s practice of denying immigration relief to those who have been arrested, but never charged with or convicted of a crime. Therefore, where the criminal justice system has already determined an individual should not be prosecuted or convicted, USCIS has no business reaching a different conclusion. *Id.* at 1619 (“[M]embership law need not do the work of public safety.”).

ably suspected the person apprehended of an offense.”<sup>55</sup> In order to make an arrest, the Fourth Amendment generally requires only that the police officer have “probable cause to believe that a criminal offense has been or is being committed,” based on a reasonable interpretation of the “facts known to the arresting officer at the time of arrest.”<sup>56</sup> The fact that USCIS relies on police reports or arrest records as evidence of wrongdoing *even when* no charges were ever filed against the petitioner or the case was ultimately dismissed<sup>57</sup> undercuts any argument that subsequent criminal proceedings might justify the use of those records.

### 1. *Incomplete Information*

One reason that police reports in particular are unreliable is that they are “one-sided and self-serving”<sup>58</sup>: Police have the power to mislead, and the incentives to do so, through their reporting.<sup>59</sup> For example, police might rely on their reports to justify arrests, so there is an incentive to reframe or exclude any information that contradicts the reasons for an arrest and to emphasize information that justifies the arrest.<sup>60</sup>

More innocuously, police reports are just one, incomplete version of events. While police reports are—hopefully—written after at least some investigation by officers, it is by no means guaranteed that they convey a complete picture of the situation that led to the report—Jessica’s story in the Introduction is just one example. Police may be

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<sup>55</sup> 353 U.S. 232, 241 (1957).

<sup>56</sup> *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (citing *United States v. Watson*, 423 U.S. 411, 417–24 (1976); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

<sup>57</sup> Practice Advisory, Cath. Legal Immigr. Network, Inc., *supra* note 6, at 2 (“Requests for these reports are being made even where the client was never charged or convicted of a crime.”).

<sup>58</sup> H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 7098, 7108–11 (Statement by the Hon. William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, upon Presenting the Conference Report on H.R. 5463 to the House for Final Consideration) [hereinafter Statement of Chairman Hungate] (discussing the unreliability of police reports in the context of formulating evidentiary rules).

<sup>59</sup> See David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 457 (1999) (“Judges, prosecutors and defense attorneys report that police perjury is commonplace, and even police officers themselves concede that lying is a regular feature of the life of a cop.”); Stanley Z. Fisher, “*Just the Facts, Ma’am*”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 4, 9–17 (1993) (describing the function of police reports and the corresponding incentives to mislead).

<sup>60</sup> See Fisher, *supra* note 59, at 7–9 (describing law enforcement’s perspective of the purpose of police reports and how they might be used to explain “negative incentive to report exculpatory facts”).

limited by time and resource constraints, pressure from superiors, or environmental factors at the time of making their reports.<sup>61</sup> Ultimately, what police choose to include, and omit, from a report will always require an amount of subjective selection.<sup>62</sup> This subjective selection of information will often disfavor the alleged perpetrator's side of the story—because when police are reporting on an alleged criminal incident, they will be more focused on evidence of wrongdoing, rather than evidence that would tend to absolve the perpetrator.<sup>63</sup> In other words, police are especially attuned to information that would justify having been called to investigate, and that information is what is most likely to make it into the report.<sup>64</sup> This type of confirmation bias is especially problematic given the overconfidence that factfinders generally place on police accounts of events.<sup>65</sup>

## 2. *Racial Discrepancies*

Racial discrepancies in the criminal justice system are also crucial to understanding the problem with relying on police reports and arrest records as evidence of wrongdoing. Most immigrants in the United States are people of color,<sup>66</sup> and people of color are more likely to be

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<sup>61</sup> *Id.* (listing “resource conservation,” “self-protection,” and “partisanship” as reasons police reports may be incomplete or omit exculpatory information).

<sup>62</sup> *See id.* at 4 (“Through their reports, the police ‘have fundamental control over the construction of [the] “facts” for a case, and all other actors (the prosecutor, the judge, the defense lawyer) must work from the framework of facts as constructed by the police.’” (quoting Richard V. Ericson, *Rules for Police Deviance*, in *ORGANIZATIONAL POLICE DEVIANCE: ITS STRUCTURE AND CONTROL* 83, 96 (Clifford D. Shearing ed., 1981))); *see also infra* note 95 (concerns of Mr. McElroy).

<sup>63</sup> Stanley Z. Fisher describes this phenomenon as a general failure of police reports to include “crucial exculpatory information.” Fisher, *supra* note 59, at 4, 7–9. While Fisher describes the lack of exculpatory information in police reports as an intentional omission by police, there is reason to believe that omission of exculpatory information can also occur *unintentionally*, merely due to human tendencies to focus on only certain information given the context in which it is presented (i.e. confirmation bias). *See generally* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. GEN. PSYCH.* 175, 211 (1998) (“[W]e seldom seem to seek evidence naturally that would show a hypothesis to be wrong . . .”).

<sup>64</sup> *See, e.g.*, *Johnson v. United States*, 333 U.S. 10, 14 (1948) (“[Police officers are] engaged in the often competitive enterprise of ferreting out crime.”).

<sup>65</sup> *See* Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 *AM. CRIM. L. REV.* 1, 3 (2010) (“Our legal system treats the police as if they are impartial fact gatherers, trained and motivated to gather facts both for and against guilt, rather than biased advocates attempting to disprove innocence, which is the reality.”).

<sup>66</sup> *See* Abby Budiman, Christine Tamir, Lauren Mora & Luis Noe-Bustamante, *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants-current-data> (finding that fewer than eighteen percent of U.S. immigrants are white).

arrested than whites for the same behavior.<sup>67</sup> Therefore, understanding arrest reports as evidence of wrongdoing leads to racially skewed results.<sup>68</sup>

Racial biases also affect the way officers report the incidents underlying arrests. Officers' interpretations and recording of incidents cannot be separated from their individual frameworks and biases, which will shape how they view and describe events. It is now well-established that all individuals suffer from at least some implicit biases,<sup>69</sup> and it would be erroneous to assume there are not still many individuals who harbor outright racism.<sup>70</sup> These biases—and sometimes, explicit racism—lead not only to disproportionate arrest rates between whites and other races, but also to inaccurate reporting of incidents.<sup>71</sup> Because most immigrants in the United States are people of color, racial discrepancies in treatment by the criminal justice system cannot be ignored when evaluating the reliability of police reports and arrest records used in USCIS adjudications.

### 3. *Uncorroborated Hearsay*

Finally, police reports are often unreliable because they are based on unverified, third-party hearsay: statements “given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone

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<sup>67</sup> See CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME & DELINQ., *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM* 3 (2009), [https://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](https://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf) (summarizing data showing arrest disparities between races).

<sup>68</sup> See *infra* note 78 and accompanying text.

<sup>69</sup> See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RSCH. 143, 146–48 (2004) (summarizing the research establishing the implicit bias phenomenon).

<sup>70</sup> See Jonathan Kahn, *The 911 Covenant: Policing Black Bodies in White Spaces and the Limits of Implicit Bias as a Tool of Racial Justice*, 15 STAN. J. C.R. & C.L. 1, 12–15 (2019) (arguing that many contemporary racial interactions—“not only the tiki-torch Nazis . . . [but also] #BBQBecky and #PermitPatty”—continue to be fueled by explicit racism, regardless of social discourse focused on implicit bias).

<sup>71</sup> The Maricopa County Sheriff's Office (Arizona) and the Ferguson Police Department (Missouri) are two high-profile examples of racially-biased and unjustified police activity. According to two federal investigations, the Maricopa County Sheriff's Office conducts a “high number of stops and detentions lacking in legal justification” against Latinx residents suspected to be immigrants, C.R. DIV., U.S. DEP'T OF JUST., UNITED STATES' INVESTIGATION OF THE MARICOPA COUNTY SHERIFF'S OFFICE 3 (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso\\_findletter\\_12-15-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf), and the Ferguson Police Department routinely arrests Black individuals without probable cause and charges individuals for crimes under circumstances that do not meet the elements of the charged offense, C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 16–19 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

other than the witness.”<sup>72</sup> Stated another way, police reports often contain statements describing a scene or incident given by third-party witnesses, rather than descriptions based on the police’s *own* observations of what happened. These types of statements suffer from what are known as the “testimonial infirmities,” which include “ambiguity, insincerity, faulty perception, and erroneous memory.”<sup>73</sup> Without the person who made the original statement around to explain herself, the person relying on that statement has no way to know exactly what the declarant meant (language is ambiguous, and meaning is often conveyed nonverbally), whether the declarant was telling the truth, whether the declarant accurately understood and perceived what they witnessed, and whether the declarant remembered the facts accurately.<sup>74</sup> As Judge Posner has so aptly put it, hearsay “often is no better than rumor or gossip.”<sup>75</sup> Therefore, it is especially unreliable for an adjudicator to rely on police reports when those reports are based, even in part, on third-party hearsay.

### B. Use in Other Contexts

Due to the problems associated with police reports and arrest records, adjudicators and decisionmakers in other contexts have recognized the limited value of such documents and sought to limit their influence. These other contexts do not demonstrate perfect analogies and this Note does not suggest that their approaches be transplanted to the affirmative immigration context. They do, however, provide circumstantial evidence, in addition to the arguments made above, demonstrating the unreliability of these types of documents by showing how they are used—or not used—outside of affirmative immigration proceedings.

#### 1. Employment and Housing

As a first example, consider the use of applicants’ criminal histories—and related documents—in the employment and housing contexts. The two federal agencies responsible for ensuring fair access to employment and housing, the Equal Employment Opportunity Commission (EEOC) and the Department of Housing and Urban Development (HUD), have both taken the explicit stance that the fact that an applicant has been arrested should not be a dispositive factor

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<sup>72</sup> *Hearsay*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>73</sup> Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974).

<sup>74</sup> See Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 177–79 (1948) (explaining the “theory of hearsay”).

<sup>75</sup> *United States v. Boyce*, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J., concurring).



in making an employment or housing decision.<sup>76</sup> One of the dangers recognized by both agencies in allowing decisions to be made based on criminal records not resulting in a conviction, in addition to the unreliability and over-breadth of such a policy,<sup>77</sup> is that such reliance will have a disparate impact on people of color.<sup>78</sup> HUD's guidance also forcefully describes the general problems with reliance on arrest records:

An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. In many cases, arrests do not result in criminal charges, and even where they do, such charges can be and often are dismissed or the person is not convicted of the crime alleged. . . . Moreover, arrest records are often inaccurate or incomplete . . . such that reliance on arrests not

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<sup>76</sup> *Enforcement Guidance on the Consideration of Arrest and Conviction Records in the Employment Decisions Under Title VII of the Civil Rights Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 25, 2012) [hereinafter *EEOC Enforcement Guidance*], [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#sdendnote101anc](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote101anc) (“Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. . . . [A]n exclusion based on an arrest, in itself, is not job related and consistent with business necessity.”); U.S. DEP'T OF HOUS. & URB. DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 3 (2015) [hereinafter 2015 HUD NOTICE], <https://www.hud.gov/sites/documents/PIH2015-19.PDF> (“[T]he fact that there has been an arrest for a crime is not a basis for the requisite determination that the relevant individual engaged in criminal activity warranting denial of admission, termination of assistance, or eviction.”).

<sup>77</sup> See, e.g., *Nashua Hous. Auth. v. Wilson*, 33 A.3d 1163, 1165–66 (N.H. 2011) (finding that criminal complaints and police officer's corroborating testimony failed to satisfy, by the preponderance of the evidence standard, that tenant engaged in criminal activity and therefore landlord had not established that tenant breached her lease); *Landers v. Chi. Hous. Auth.*, 936 N.E.2d 735, 741–42 (Ill. App. Ct. 2010) (finding that “petitioner's dismissed arrests do not constitute a history of criminal activity and therefore cannot support the rejection of his application for public housing”).

<sup>78</sup> See *EEOC Enforcement Guidance*, *supra* note 76 (“National data . . . supports a finding that criminal record exclusions have a disparate impact based on race and national origin.”); U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 2 (2016) (“[W]here a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act . . . .”); see also *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972) (finding that employer's policy of refusing to hire individuals who had been arrested on multiple occasions, without convictions, violated Title VII and denied Black applicants equal opportunities in employment due to racial discrepancies in arrest rates); *supra* notes 69–71 and accompanying text (arguing that disparate treatment between white people and people of color by law enforcement is a factor undermining the reliability of police reports).

resulting in conviction as the basis for denying applicants . . . may result in unwarranted denials . . . .<sup>79</sup>

Despite the EEOC and HUD's recognition that the fact of an arrest alone is insufficient to deny an applicant the benefits of employment or housing, neither agency has gone so far as to require a criminal *conviction* to take adverse action.<sup>80</sup> Nevertheless, unlike USCIS, in order for an applicant to be denied housing based on criminal conduct that did not result in a conviction, HUD requires that the alleged wrongdoing be proved by a preponderance of the evidence.<sup>81</sup>

In addition, some states and localities provide even more robust protection for individuals with criminal records. For example, several states prohibit employers from considering any non-conviction criminal record in making employment decisions.<sup>82</sup> Other states protect individuals with criminal records by restricting employers' access to non-conviction information.<sup>83</sup> In addition, fourteen states and twenty cities have enacted "ban the box" ordinances (also called fair chance laws), which prohibit employers from asking about applicants' criminal histories on job applications.<sup>84</sup> Several cities have also implemented fair chance laws for housing, restricting whether and how a landlord may consider a housing applicant's criminal history when making a decision about a prospective tenant.<sup>85</sup>

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<sup>79</sup> 2015 HUD NOTICE, *supra* note 76, at 3–4.

<sup>80</sup> See *EEOC Enforcement Guidance*, *supra* note 76 ("Although an arrest record standing alone may not be used to deny an employment opportunity, an employer *may* make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant . . . ." (emphasis added)); 24 C.F.R. § 982.553(c) (2020) (termination of housing assistance is appropriate where it is established by a preponderance of the evidence, *regardless* of arrest or conviction, that a household member has engaged in criminal activity).

<sup>81</sup> See 24 C.F.R. § 982.553(c). Nevertheless, a preponderance of the evidence standard is still much lower than the beyond a reasonable doubt standard required to convict at a criminal trial. See *In re Winship*, 397 U.S. 358, 367–68 (1970) (describing the difference between preponderance of the evidence and beyond a reasonable doubt standards and requiring the latter during the adjudicatory stage of juvenile delinquency proceedings).

<sup>82</sup> These states include California, Hawaii, Michigan, New York, Rhode Island, Pennsylvania, and Wisconsin. See Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 92–94 (2017) (summarizing these states' laws).

<sup>83</sup> See *id.* at 96.

<sup>84</sup> Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Sept. 30, 2020), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide>.

<sup>85</sup> Seattle's fair housing law is currently the nation's most progressive: "It doesn't allow landlords to consider criminal histories at all." Charlotte West, *Seattle's Fair Housing Law Is the Most Progressive in the Country. But Now, Landlords Are Challenging It.*, NBC NEWS (May 19, 2019, 5:03 AM), <https://www.nbcnews.com/news/nbcblk/seattle-s-fair->

Thus, while the protection afforded to individuals in the employment and housing contexts is by no means perfect, agencies in those contexts—who, like USCIS, face choices about whom to provide services for—have deemed non-conviction records to be an incomplete and, in many cases, biased indicator of eligibility.

## 2. *Federal and State Rules of Evidence*

A second context in which adjudicators' ability to consider police reports and arrest records is limited are federal and state rules of evidence. Unlike administrative immigration adjudications, where evidence is admissible as long as it is "probative" and "fundamentally fair,"<sup>86</sup> all evidence admitted in a civil or criminal trial must be admissible under statutorily-enacted rules of evidence. One type of evidence that is heavily regulated by these rules is hearsay: out-of-court statements offered for the truth of the matter asserted in those statements.<sup>87</sup>

Hearsay is inadmissible unless it falls within an enumerated exception to the evidentiary rule.<sup>88</sup> Therefore, because police reports themselves are hearsay,<sup>89</sup> they are inadmissible unless they fit within an exception to the hearsay rule. While many jurisdictions' rules of evidence contain a hearsay exception for "public records,"<sup>90</sup> "matter[s] observed by law-enforcement personnel," i.e. police

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housing-law-most-progressive-country-now-landlords-n1004321 (describing fair housing laws in Seattle, Detroit, Chicago, San Francisco, Newark, and Washington, D.C.).

<sup>86</sup> See *Matter of Velasquez*, 19 I. & N. Dec. 377, 380 (B.I.A. 1986) ("[Documentary evidence] need only be probative and its use fundamentally fair, so as not to deprive an alien of due process of law."); see also *Antia-Perea v. Holder*, 768 F.3d 647, 657 (7th Cir. 2014) (same); *Tassi v. Holder*, 660 F.3d 710, 720–21 (4th Cir. 2011) (holding that the immigration judge erred by excluding otherwise probative evidence because it failed to conform to the rules of evidence).

<sup>87</sup> FED. R. EVID. 801. In addition to the rules of evidence, the Confrontation Clause of the Constitution also places limits on the use of hearsay in criminal cases. Holper, *supra* note 28, at 690–93. Mary Holper has persuasively argued that, due to the similarities between a criminal trial and deportation proceedings, immigrants facing removal also have the right to confront and cross-examine the officers who made the reports if police reports are used against them. See generally *id.*

<sup>88</sup> See FED. R. EVID. 802 ("Hearsay is not admissible unless [provided otherwise]."); see also *supra* notes 73–75 and accompanying text (explaining the "testimonial infirmities" which make hearsay unreliable). However, hearsay evidence *is* admissible at suppression hearings. See *United States v. Raddatz*, 447 U.S. 667, 679 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial.").

<sup>89</sup> Police reports are out-of-court statements, because the reporting officer is not in court testifying, offered to prove the truth of the matters asserted in the report. See FED. R. EVID. 801.

<sup>90</sup> E.g., FED. R. EVID. 803(8); ILL. R. EVID. 803(8); IND. R. EVID. 803(8); MINN. R. EVID. 803(8); PA. R. EVID. 803(8); CAL. EVID. CODE § 1280.

reports, are still inadmissible in criminal cases in many of those jurisdictions.<sup>91</sup> The Uniform Rules of Evidence and several states go further and prohibit the admission of police reports in civil cases as well.<sup>92</sup>

The Eighth Circuit summarized the rationale behind the rule excluding police reports from evidence as follows: “Such observations [by the police at the scene of the crime] are potentially unreliable since they are made in an adversary setting, and are often subjective evaluations of whether a crime was committed.”<sup>93</sup> This same reasoning is reflected in the congressional report explaining the federal rule at the time of its adoption.<sup>94</sup> Similarly, concerns about the reliability of police reports were also expressed in discussions among the Commissioners on Uniform State Laws prior to the adoption of the Uniform Rules of Evidence, with one Commissioner describing police reports as “the rankest kind of hearsay.”<sup>95</sup>

Based on these reliability concerns expressed by the crafters of rules of evidence, one might question why adjudicators in the immigration context have nonetheless determined that the use of police reports as evidence against immigrants is fair, or even “especially appropriate.”<sup>96</sup>

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<sup>91</sup> *E.g.*, FED. R. EVID. 803(8)(A)(ii); *see also* ILL. R. EVID. 803(8)(B); MINN. R. EVID. 803(8)(B).

<sup>92</sup> *See, e.g.*, UNIF. R. EVID. 803(8) (excluding, in all cases, from the public records exception to the hearsay rule “an investigative report by police and other law enforcement personnel” and “factual findings resulting from special investigation of a particular complaint, case, or incident,” except when offered by the accused in criminal cases); DEL. R. EVID. 803(8) (adopting Uniform Rule); IDAHO R. EVID. 803(8) (excluding “an investigative report by law enforcement personnel or a public office’s factual finding resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case”); IND. R. EVID. 803(8)(B) (adopting Uniform Rule); IOWA R. EVID. 5.803(8) (adopting Uniform Rule).

<sup>93</sup> *United States v. Enterline*, 894 F.2d 287, 290 (8th Cir. 1990).

<sup>94</sup> “Police reports . . . tend to be one-sided and self-serving. They are frequently prepared for the use of prosecutors, who use such reports in deciding whether to prosecute.” Statement of Chairman Hungate, *supra* note 58.

<sup>95</sup> *Proceedings in Comm. of the Whole Revised Unif. Rules of Evidence*, 82d Ann. Conf. of Nat’l Conf. of Comm’rs on Unif. State L. 232–33 (1973) (statements of Mr. Townsend and Mr. McElroy) (“[Because they are not made under oath, police reports] are usually very sloppy and made under pressure, and so forth.” (statement of Mr. Townsend); “The police officer . . . interviews witnesses, makes measurements, files a report, and frequently bases his citation on what he has in the report . . . I have no way of determining the veracity of the witnesses or of determining how he went about his investigation.” (statement of Mr. McElroy)).

<sup>96</sup> *See Matter of Grijalva*, 19 I. & N. Dec. 713, 722 (B.I.A. 1988) (“[T]he admission . . . [of] police reports is especially appropriate in cases involving discretionary relief from deportation, where all relevant factors concerning an arrest and conviction should be considered to determine whether an alien warrants a favorable exercise of discretion.”).

### 3. *Deportation Context*

A final example of how decisionmakers are limited in their consideration of police reports and arrest records is within the deportation context. In the majority of cases where an immigrant is in removal proceedings and the government's basis for removal is the immigrant's conviction of a crime, decisionmakers are *not* permitted to consider documents such as police reports, arrest records, or criminal complaints—documents that would describe the underlying facts of the conviction. Instead, they are limited to considering the immigrant's "record of conviction"<sup>97</sup> to determine whether the generic definition of the crime that the immigrant was convicted of meets the generic definition of the crime contained in the INA.<sup>98</sup>

Unlike in the employment, housing, and rules of evidence contexts, limitations on the use of police reports and arrest records in deportation proceedings are not explicitly based on concerns about reliability. Instead, they are grounded in a desire to limit immigration adjudicators' discretion with regard to the relevance of an immigrant's criminal history and achieve uniformity with regard to the types of criminal convictions that categorically exclude immigrants.<sup>99</sup>

Therefore, it seems illogical that while an immigration court would be unable to make a categorical removal decision based on the "facts" contained in a police report or arrest record for an immigrant actually convicted of a crime, USCIS may rely on those same "facts" to reach an unfavorable decision in an exercise of discretion. While such an approach—ignoring police reports and arrest records for purposes of categorical decisions but using them to make discretionary ones—might be somewhat more justifiable in the deportation context, where at least the immigrant is provided with an evidentiary hearing, it is altogether inappropriate in the non-adversarial affirmative immigration context, where applications are processed by a non-neutral executive agency without a meaningful opportunity to contest the

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<sup>97</sup> See *Moncrieffe v. Holder*, 569 U.S. 184, 197–98 (2013) (“[O]ur ‘more focused, categorical inquiry’ is whether the record of conviction of the predicate offense [falls within the proscribed grounds in the INA].” (citation omitted)).

<sup>98</sup> See, e.g., *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 335 (B.I.A. 1996) (“[T]he principle of not looking behind a record of conviction . . . [is] the only workable approach in cases where deportability is premised on the existence of a conviction.”); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1674 n.18 (2011) (“[I]mmigration adjudicators examine the statutory definition of the offense to determine if it corresponds to a removable offense.”).

<sup>99</sup> See Das, *supra* note 98, at 1689 (“Congress intended to limit the ability of immigration adjudicators to probe the circumstances underlying a criminal conviction in assessing immigration penalties . . . [and] restrict[ ] the role of immigration adjudicators in meting out deportation penalties.”).

charges. The result provides the executive branch with a backdoor approach for excluding not only those immigrants convicted of crimes as specified by Congress in the INA, but also those immigrants who were merely *accused*—however temporarily—of a crime at one point in their lives.

*C. The Affirmative Immigration Context Does Not Justify a Different Result*

Proponents of USCIS's policy to consider police reports and arrest records in the affirmative immigration context might argue that despite their imperfection, the information is useful for allocating finite immigration benefits among a large number of applicants—i.e., it is reasonable for the agency to conclude that someone who has never had contact with law enforcement is a better candidate for lawful immigration status than one who has had one or more arrests, especially if the information contained in the corresponding police reports seems serious.

There are two responses to this argument. First, the same argument could be made in the employment and housing contexts—that the imperfect information contained in these documents is better than nothing to determine who among many applicants should get the job or the housing benefit—but nevertheless, decisionmakers have determined that the problems with the records often outweigh their probative value. Because an immigration benefit is arguably even more integral to an individual's livelihood than a job or housing, based on the cascade of interests implicated by immigration status,<sup>100</sup> adjudicators should be more—not less—skeptical of the evidence relied upon to reach immigration decisions.

Second, and perhaps more importantly, the utility of police reports and arrest records in making immigration determinations depends upon the assumption that the documents are reliable enough to be relevant when the agency makes a decision. However, the foregoing discussion demonstrates that these documents are *not* inherently reliable, and in many cases they are more likely to be a function of race and patterns of police behavior than an individual's propensity to participate in criminal activity.<sup>101</sup> Drafters of rules of evidence have also undertaken this calculus—whether police reports are reliable enough to be considered as probative evidence in a case—and determined that they are not in many circumstances.<sup>102</sup>

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<sup>100</sup> See *supra* notes 32–36 and accompanying text.

<sup>101</sup> See *supra* notes 66–71 and accompanying text.

<sup>102</sup> See *supra* notes 86–96 and accompanying text.

Additionally, any argument that reliance on these documents is necessary in the immigration context due to national security concerns<sup>103</sup> ignores the myriad of other—more reliable—tools at the disposal of our government to protect national security. There is little evidence that USCIS agents, in particular by their reliance on inherently unreliable documents, are able to add any legitimate value to the national security functions of other law enforcement agencies, like the Federal Bureau of Investigation (FBI).<sup>104</sup>

While this Note's discussion of the unreliability of police reports and arrest records does not necessarily cover new ground,<sup>105</sup> it provides a new lens through which to understand why this unreliability is problematic. As this Part demonstrates, decisionmakers in a variety of other contexts have already acknowledged the diminished value of such documents and limited their use and application. It is time for USCIS to do the same.

### III

#### LEGAL CHALLENGES: USCIS'S POLICY IS FUNDAMENTALLY UNFAIR

Having established the problems created by USCIS's policy of requesting police reports and arrest records in response to affirmative immigration applications, this Part considers two legal challenges to the policy. I argue that the policy is fundamentally unfair in violation of both the Administrative Procedure Act (APA) and the guarantee of due process provided by the Fifth Amendment. In particular, USCIS's policy violates clear Board of Immigration Appeals' precedent and is therefore "unlawful agency action" under the APA. More fundamentally, USCIS's policy deprives immigrants of a constitutionally adequate procedure by which to apply for affirmative immigration relief, violating the *Mathews v. Eldridge* test for procedural due process.

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<sup>103</sup> E.g., *National Security Threats—Chain Migration and the Visa Lottery System*, WHITE HOUSE (Feb. 1, 2018), <https://www.whitehouse.gov/articles/national-security-threats-chain-migration-visa-lottery-system> ("Our current immigration system jeopardizes our national security and puts American communities at risk.").

<sup>104</sup> See Harry Brandon, Vincent Cannistraro & Angela Kelley, *Immigration Policy, Law Enforcement and National Security*, 26 DEF. ALIEN 3, 11–12 (2003) (arguing that immigration agencies are undercutting the FBI's counterterrorism efforts).

<sup>105</sup> See, e.g., Holper, *supra* note 28, at 682–88 (providing a thorough explanation of why police reports are unreliable).

### A. APA Challenge

Because USCIS is an administrative agency, it is governed by the APA.<sup>106</sup> Therefore, one way to assert a legal challenge against USCIS’s policy—and the most likely to succeed—is to show that it violates the APA.

#### 1. USCIS’s Policy Violates the APA

“The APA confers a general cause of action upon persons ‘adversely affected or aggrieved by agency action . . . .’”<sup>107</sup> Thus, federal courts may review “final agency action[s]”<sup>108</sup> for which there is no other adequate remedy in a court<sup>109</sup> and “hold unlawful” agency decisions that are “not in accordance with law.”<sup>110</sup> Of particular relevance here, USCIS’s policy violates the APA because it is in violation of Board of Immigration Appeals (BIA) precedent<sup>111</sup> that requires evidence under consideration in an immigration proceeding to “be probative and its use fundamentally fair, so as not to deprive an alien of due process of law.”<sup>112</sup>

While “it is settled beyond hope of contradiction”<sup>113</sup> that immigration officials in both the affirmative and removal contexts *may* consider arrest and police reports in the exercise of their discretion,<sup>114</sup>

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<sup>106</sup> The APA was enacted to “preserve[] individual rights as against the abuse of administrative power.” Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 *FORDHAM ENV’T L. REV.* 207, 207–08 (2016).

<sup>107</sup> *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (quoting 5 U.S.C. § 702).

<sup>108</sup> Because an agency action must be “final” in order to be reviewable by a federal court, an immigrant who wishes to challenge USCIS’s policy will need to exhaust her right to administratively appeal to the AAO or Board of Immigration Appeals (if available) before filing an action in district court. *E.g.*, *Mejia Rodriguez v. U.S. Dep’t of Homeland Sec.*, 562 F.3d 1137, 1145–46 (11th Cir. 2009) (finding that decision by AAO to deny request for TPS and dismiss appeal was a “final agency decision” capable of review under APA § 704).

<sup>109</sup> 5 U.S.C. § 704.

<sup>110</sup> 5 U.S.C. § 706(2)(A).

<sup>111</sup> BIA precedent is controlling over USCIS. *See* 8 C.F.R. § 1003.1(g)(1) (2020).

<sup>112</sup> *Matter of Velasquez*, 19 I. & N. Dec. 377, 380 (B.I.A. 1986).

<sup>113</sup> *Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015).

<sup>114</sup> *See Matter of Grijalva*, 19 I. & N. Dec. 713, 722 (B.I.A. 1988) (holding that police reports containing hearsay are not per se excluded from evidence under the “fundamentally unfair” evidentiary standard which applies to immigration adjudications); *Matter of Thomas*, 21 I. & N. Dec. 20, 23 (B.I.A. 1995) (finding it “appropriate to consider evidence of unfavorable conduct, including criminal conduct which has not culminated in a final conviction for purposes of the [INA]” when deciding whether to grant discretionary relief); *see also Perez v. Barr*, 927 F.3d 17, 20–21 (1st Cir. 2019) (affirming prior decision holding “that an immigration court may generally consider a police report containing hearsay when making a discretionary immigration decision, even if an arrest did not result in a charge or conviction, because the report casts probative light on an alien’s character” (internal quotation marks omitted) (quoting *Mele v. Lynch*, 798 F.3d 30, 32 (1st Cir. 2015))); *Henry v. Immigr. & Naturalization Serv.*, 74 F.3d 1, 6 (1st Cir. 1996) (“[W]hile an



the BIA has also established a clear limit to the probative value of these reports: Adjudicators may *not* “give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein.”<sup>115</sup> Therefore, in order to avoid committing legal error, an immigration official may only consider an unsubstantiated arrest report if it is not given “substantial weight.”<sup>116</sup> If we apply this rule to USCIS’s policy: USCIS may only rely on police reports or arrest records if it also receives additional corroborating evidence regarding the allegations contained in them. Without additional corroboration, USCIS violates BIA precedent when it gives these types of records substantial weight by denying applications based on allegations contained in them.

From a policy standpoint, an additional consideration makes USCIS’s reliance on police reports and arrest records even more problematic than other decisionmakers’ use of those same documents. While immigrants in removal proceedings are entitled to a hearing before an immigration judge,<sup>117</sup> under current law, affirmative immigration petitioners do not have a right to a hearing prior to a decision on their applications. Instead, USCIS makes its determinations based solely on written evidence.<sup>118</sup> Some of the Supreme Court’s seminal procedural due process cases have outlined why this is concerning:

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arrest, without more, is simply an unproven charge, the fact of the arrest, and its attendant circumstances, often have probative value in immigration proceedings.”); *cf.* *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) (declining to adopt a *per se* rule prohibiting the consideration of arrest reports in the context of discretionary decisions); *Sorcía v. Holder*, 643 F.3d 117, 126 (4th Cir. 2011) (concluding that it is not “*per se* improper to consider an arrest report”); *Parcham v. Immigr. & Naturalization Serv.*, 769 F.2d 1001, 1005 (4th Cir. 1985) (“Evidence of an alien’s conduct, without a conviction, may be considered in denying the discretionary relief . . .”).

<sup>115</sup> *Matter of Arreguin De Rodriguez*, 21 I. & N. Dec. 38, 42 (B.I.A. 1995) (declining to give weight to an arrest record where prosecution was declined and there was no corroboration).

<sup>116</sup> *Compare Souleman v. Att’y Gen.*, 472 F. App’x 120, 123 (3d Cir. 2012) (concluding that immigration judge did not err by considering arrest reports where they were corroborated by police testimony, testimony of petitioner’s wife, petitioner’s own testimony, fact of a protective order, and expert testimony), *with Avila-Ramirez*, 764 F.3d at 725 (finding that BIA erred when it “gave the arrest reports significant weight” even though no prosecution or conviction followed and no corroborating evidence was presented).

<sup>117</sup> *See* 8 U.S.C. § 1229a(b)(4)(B) (requiring, in removal proceedings, “a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government”).

<sup>118</sup> While an interview between the applicant and a USCIS official is a component of some affirmative immigration applications, these interviews are *not* analogous to an evidentiary hearing. Instead, the purpose of such interviews is for “the officer [to] verify[] that the applicant understood the questions on the application and [to] provide[] the applicant with an opportunity to revise any answers completed incorrectly or that have changed since filing the application.” *See* 7 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY

Where “issues of witness credibility and veracity often are critical to the decisionmaking process,”<sup>119</sup> “written submissions are a wholly *unsatisfactory* basis for decision” because “they do not permit the [applicant] to mold his argument to the issues the decisionmaker appears to regard as important.”<sup>120</sup> Therefore, although the BIA and many courts of appeals have repeatedly affirmed that immigration courts’ authority to consider arrest or police reports that never resulted in a charge or conviction is “fundamentally fair,” allowing USCIS to consider those documents “deprive[s] [immigrants] of due process of law” due to the lack of evidentiary hearings in the affirmative immigration context.<sup>121</sup>

In sum, in the affirmative adjudication context, it is not “fundamentally fair” for USCIS to consider arrest or police reports, especially where it is extremely unlikely the agency will gather the type of corroborating evidence that the BIA requires in order to give “substantial weight” to information contained in such reports. The problem is exacerbated by the lack of evidentiary hearings available in the affirmative context, as opposed to the more court-like nature of deportation proceedings.

It’s possible that a court might reject an across-the-board facial challenge to USCIS’s policy. It might determine, for instance, that it is not a violation of law for USCIS to rely on arrest and police reports so long as there is additional corroboration, which would involve an individualized inquiry into the existence of corroboration in every case. But even so, courts should still find in individual cases that the policy is contrary to law and a violation of the APA where the individual can prove that USCIS impermissibly relied on information contained in an unsubstantiated arrest or police report to deny her application.<sup>122</sup>

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MANUAL pt. A, ch. 5 (2020), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-5>.

<sup>119</sup> *Mathews v. Eldridge*, 424 U.S. 319, 343–44 (1976) (explaining the Court’s opinion in *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

<sup>120</sup> *Goldberg*, 397 U.S. at 269 (emphasis added).

<sup>121</sup> *Matter of Velasquez*, 19 I. & N. Dec. 377, 380 (B.I.A. 1986).

<sup>122</sup> *E.g.*, *Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) (finding that the BIA improperly failed to follow its own precedent by relying on uncorroborated arrest reports to deny relief); *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 712–13 (6th Cir. 2004) (holding that immigration judge erroneously considered “unproven allegations of sexual misconduct” in ordering deportation because “[t]here was no independent evidence of the allegations”).

## 2. *Courts Retain Jurisdiction Over APA Challenges to USCIS's Policy*

Confronted with an APA challenge, the government would undoubtedly argue that federal courts lack jurisdiction to hear claims against USCIS because most of the decisions that implicate this policy are discretionary, like adjustment of status. The discretionary nature of the determinations raises two jurisdictional barriers to an APA challenge: 1) the APA's bar on judicial review of decisions "committed to agency discretion by law"<sup>123</sup> and 2) the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) jurisdiction-stripping provisions, which prohibit federal courts from reviewing certain discretionary immigration decisions except for "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals."<sup>124</sup>

However, these jurisdictional barriers are not absolute. With regard to the APA's discretionary decision bar, the Supreme Court has held that the APA's bar to review of discretionary decisions is narrow and only implicated where the law is such that there would be "no meaningful standard" for a reviewing court to apply.<sup>125</sup> The Court came to this conclusion due to the "strong presumption favoring judicial review of administrative action,"<sup>126</sup> as well as the tension between the APA provisions both granting courts the authority to set aside agency actions as abuses of discretion and prohibiting review of discretionary decisions.<sup>127</sup> Typically, according to the Court, where "[a]n agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a [specific] standard" judicial review is appropriate.<sup>128</sup>

Therefore, while the INA does grant the Attorney General and Secretary of Homeland Security discretion to adjudicate immigration applications, that discretion is far from unfettered<sup>129</sup> and there is a

<sup>123</sup> 5 U.S.C. § 701(a)(2).

<sup>124</sup> 8 U.S.C. § 1252(a)(2)(B), (D).

<sup>125</sup> *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)) (referring to APA §§ 706(2)(A) and 701(a)(2)).

<sup>126</sup> *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015).

<sup>127</sup> *Weyerhaeuser Co.*, 139 S. Ct. at 370.

<sup>128</sup> *Id.*

<sup>129</sup> For example, in addition to the precedential BIA decisions which govern immigration proceedings, see *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 893 (9th Cir. 2018) (holding that the factors enumerated in a precedential BIA decision provide a "sufficiently meaningful standard" by which to evaluate the denial of a request for administrative closure), the INA itself imposes limits on the Attorney General's discretion. See, e.g., 8 U.S.C. § 1255 (imposing limits on the exercise of discretion to adjust status).

sufficiently meaningful standard to justify federal court review.<sup>130</sup> In particular, the BIA's interpretation of "fundamental fairness"—discussed above—which bars decisionmakers from substantially relying on police reports absent additional corroborating evidence,<sup>131</sup> is the meaningful standard that a court would and should apply to evaluate USCIS's policy under the APA.<sup>132</sup>

The second jurisdictional challenge to overcome is IIRIRA, which specifically precludes federal court review of adjustment of status under section 245 of the INA as well as other discretionary determinations.<sup>133</sup> Still, IIRIRA's jurisdiction-stripping provisions are also not absolute. Like the APA, the jurisdiction-stripping provisions do not apply to questions of law made in the context of discretionary determinations.<sup>134</sup> The statute contains an exception which applies in this case: "Nothing . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law."<sup>135</sup>

Therefore, despite IIRIRA, courts continue to have jurisdiction to hear a challenge to USCIS's policy because such a challenge is based on a question of law—in particular, whether the *process* USCIS uses to adjudicate applications violates the Constitution or other federal law. In other words, the challenge would be to the legality of the process that USCIS uses to reach its discretionary decisions, not to the decisions themselves. This understanding of the scope of the jurisdiction-stripping provision has already been adopted by the circuit courts.<sup>136</sup> For example, one circuit court has held that it was "legal error" for an immigration judge to rely on uncorroborated accusations

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<sup>130</sup> See *Immigr. & Naturalization Serv. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (finding that APA review is appropriate for agency decisions that are "unfettered at the outset" but later limited by a rule or settled course of adjudication); *Perez Perez v. Wolf*, 943 F.3d 853, 861 (9th Cir. 2019) ("In several immigration cases, we have held that there are meaningful standards of review and have declined to apply § 701(a)(2).").

<sup>131</sup> See *supra* notes 114–16 and accompanying text.

<sup>132</sup> Cf. *Gonzalez-Vega v. Lynch*, 839 F.3d 738, 741 (8th Cir. 2016) (joining other circuits in holding that BIA precedent supplies a meaningful standard of review for denials of motions for administrative closure).

<sup>133</sup> 8 U.S.C. § 1252(a)(2)(B) (precluding judicial review of relief granted under several sections of the INA and other discretionary actions taken by the Attorney General or Secretary of Homeland Security).

<sup>134</sup> See *Garcia-Padron v. Holder*, 558 F.3d 196, 198–99 (2d Cir. 2009) (holding that the court retained jurisdiction to review legal or constitutional questions, including statutory eligibility for discretionary relief, under IIRIRA).

<sup>135</sup> 8 U.S.C. § 1252(a)(2)(D).

<sup>136</sup> E.g., *Enriquez-Gutierrez v. Holder*, 612 F.3d 400, 406 (5th Cir. 2010) (holding that court retained jurisdiction to review legal or constitutional questions, including statutory eligibility for discretionary relief, under IIRIRA); *Pascua v. Holder*, 641 F.3d 316, 318 (9th Cir. 2011) (same); *Lupera-Espinoza v. Att'y Gen.*, 716 F.3d 781, 785 (3d Cir. 2013) (same).

of sexual misconduct to deny an application for adjustment of status in contradiction of BIA precedent.<sup>137</sup> Thus, because an APA claim is a *legal* challenge to the *process* that USCIS applies—rather than a challenge to the outcome in a particular case—federal courts continue to possess subject matter jurisdiction over the claim.

One final wrinkle does remain, however. Several courts of appeals have held, relying on language in the REAL ID Act of 2005 (an amendment to IIRIRA) referring to “appropriate court[s] of appeals,”<sup>138</sup> that those constitutional and legal claims that are not barred under the jurisdiction-stripping provision may *only* be made in the context of an appeal to a circuit court during removal proceedings.<sup>139</sup> Under these decisions, a claimant would not be able to file a claim challenging USCIS’s policy in district court immediately after having been denied relief; she would need to wait until she were placed in removal proceedings before a federal appeals court would have jurisdiction over her claim.

However, the circuits that have adopted the view that district courts lack jurisdiction over constitutional and legal challenges to adjustment of status decisions have based their holdings on an interpretation of the scope of the statutory amendment, without considering how it interacts with prior case law.<sup>140</sup> This interpretation fails to recognize that a majority of the courts of appeals recognized that fed-

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<sup>137</sup> *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 711, 712–13 (6th Cir. 2004).

<sup>138</sup> The REAL ID Act of 2005 amended IIRIRA to explicitly provide for judicial review of orders of removal based on “constitutional claims or questions of law.” See 8 U.S.C. § 1252(a)(2)(D); see also *Mamigonian v. Biggs*, 710 F.3d 936, 945–46 (9th Cir. 2013) (explaining the amendment).

<sup>139</sup> See, e.g., *Lee v. U.S. Citizenship & Immigr. Servs.*, 592 F.3d 612, 620 (4th Cir. 2010) (“To the extent Congress decided to permit judicial review of a constitutional or legal issue bearing upon the denial of adjustment of status, it intended for the issue to be raised to the court of appeals *during removal proceedings.*”); *Abdelwahab v. Frazier*, 578 F.3d 817, 820 n.4, 821 (8th Cir. 2009) (“By its plain language, § 1252(a)(2)(B)(ii) applies to discretionary action not taken in a removal proceeding.”); *Hamilton v. Gonzales*, 485 F.3d 564, 566–67 (10th Cir. 2007) (“In our view, a final order of removal is a prerequisite to the application of § 1252(a)(2)(D).”); *But see Mamigonian*, 710 F.3d at 946 (rejecting the argument that the REAL ID Act precludes district court review and holding “that district courts maintain jurisdiction to hear cases under the APA challenging final agency determinations respecting eligibility for the immigration benefits enumerated in § 1252(a)(2)(B)(i) made on nondiscretionary grounds when there are no pending removal proceedings at which the alien could seek those benefits”); *Mejia Rodriguez v. U.S. Dep’t of Homeland Sec.*, 562 F.3d 1137, 1146 (11th Cir. 2009) (reversing district court’s determination that suit raising a legal challenge to USCIS’s denial of a discretionary benefit must be raised first with the court of appeals in the first instance); see also *Hosseini v. Johnson*, 826 F.3d 354, 359, 362 (6th Cir. 2016) (reaching the same conclusion without explicitly considering the REAL ID Act).

<sup>140</sup> See, e.g., *Hamilton*, 485 F.3d at 567 (interpreting the “plain language” of § 1252(a)(2)(D)).

eral courts retained jurisdiction over constitutional and legal questions under IIRIRA even *before* the statute was amended to specifically recognize such an exception.<sup>141</sup> Therefore, even if the statutory text does not specifically authorize district courts to exercise jurisdiction over legal or constitutional claims, prior case law does.<sup>142</sup> The result is that, whether a challenge to USCIS's policy arises in the context of an appeal during removal proceedings, or in a direct challenge following USCIS's denial of an application for status, both district courts and courts of appeals have jurisdiction to hear the challenge.

### B. Due Process Challenge

A second avenue for challenging USCIS's policy is via a procedural due process challenge under the Fifth Amendment, which provides that no person shall "be deprived of life, liberty, or property, without due process of law."<sup>143</sup> The concept of procedural due process protects individuals from suffering "grievous loss,"<sup>144</sup> without a meaningful opportunity to be heard.<sup>145</sup> This Note argues that due process protection extends to individuals who are affirmatively applying for immigration status or benefits and that USCIS's current practice regarding police reports and arrest records deprives these individuals of a constitutionally adequate opportunity to be heard.

A due process claim is comprised of two elements: First, a claimant must establish the existence of a property or liberty interest;

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<sup>141</sup> See *Mamigonian*, 710 F.3d at 944 n.5 (collecting cases from the majority of the courts of appeals that hold that § 1252(a)(2)(B)(i) does not strip courts of jurisdiction over nondiscretionary questions arising in the context of discretionary immigration relief).

<sup>142</sup> *Id.* at 944–46 (holding that district courts retain jurisdiction to review nondiscretionary decisions, i.e., constitutional or legal questions, made in final agency determinations). In reaching its conclusion, the Ninth Circuit reaffirmed its earlier holding in *Montero-Martinez v. Ashcroft*, which determined that IIRIRA's jurisdiction-stripping provisions do not preclude judicial review of "purely legal and hence non-discretionary" decisions that arise in the context of discretionary grants of relief. 277 F.3d 1137, 1143–44 (9th Cir. 2002). The *Mamigonian* court also specifically found that in adopting the statutory exception to IIRIRA's jurisdiction-stripping provisions, Congress did not intend "to abrogate *Montero-Martinez* or the numerous similar cases from sister courts of appeals." 710 F.3d at 945; see also *Ashfaq v. Barr*, 793 F. App'x 517, 518 (9th Cir. 2019) (determining that district court lacked jurisdiction over claim only because no legal error had been committed, not under the statutory language). The Ninth Circuit is not the only circuit to reach this conclusion, however. See, e.g., *Mejia Rodriguez*, 562 F.3d at 1146 (holding that district courts have subject matter jurisdiction under APA to review nondiscretionary USCIS determinations made in the course of adjudicating a discretionary immigration benefit); see also *Hosseini*, 826 F.3d at 359, 362 (same).

<sup>143</sup> U.S. CONST. amend. V. The Due Process Clause applies to citizens and all other persons physically present in the country. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

<sup>144</sup> *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

<sup>145</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

then she must show a deprivation of that interest without due process.<sup>146</sup> I discuss each of these elements in turn.

### 1. *The Right to Affirmatively Apply for Immigration Status Is a Protected Interest*

The right to procedural due process under the Fifth Amendment is not unlimited: It applies only to those interests encompassed by the Amendment's protection of liberty or property.<sup>147</sup> Therefore, before a court will even reach the question of the adequacy of the procedures provided, it must satisfy itself that the right to which the procedures attach is constitutionally protected.<sup>148</sup> Admittedly, a majority of the courts of appeals to have considered the issue have held that individuals do not have a constitutionally protected interest in discretionary immigration relief,<sup>149</sup> which includes most of the affirmative forms of relief that are implicated by USCIS's policy.<sup>150</sup> This Note argues that these circuits have interpreted Supreme Court precedent too narrowly and have been too quick to summarily dismiss due process claims in the discretionary immigration context.

The two Supreme Court cases primarily relied on by circuit courts for the proposition that discretionary immigration relief cannot give rise to a procedural due process challenge—*Dumschat* and *Castle Rock*—are distinguishable in important respects. In particular, the nature of the discretionary relief at issue in those cases was very different from the nature of agencies' discretion to adjudicate immigration claims, and thus reliance on them to categorically preclude due

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<sup>146</sup> See *Bryant v. N.Y. State Educ. Dep't*, 692 F.3d 202, 218 (2d Cir. 2012).

<sup>147</sup> See *Bd. of Regents v. Roth*, 408 U.S. 564, 569–70 (1972).

<sup>148</sup> See *id.* at 578–79 (finding that, because respondent did not have a constitutionally protected interest in re-employment by a state university, the Court would not analyze the procedures used in the re-hiring process under the due process framework).

<sup>149</sup> See, e.g., *Singh v. Mukasey*, 263 F. App'x 161, 164 (2d Cir. 2008) (“We join several of our sister circuits in finding no constitutionally protected liberty or property interest when a petitioner seeks such discretionary [immigration] relief.”); *Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) (reaching the same conclusion); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002) (same); *Huicochea-Gomez v. Immigr. & Naturalization Serv.*, 237 F.3d 696, 700 (6th Cir. 2001) (same); *Oguejiofor v. Att’y Gen.*, 277 F.3d 1305, 1309 (11th Cir. 2002) (same); *Escudero-Corona v. Immigr. & Naturalization Serv.*, 244 F.3d 608, 615 (8th Cir. 2001) (same). *But see* *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004) (sustaining collateral due process attack to prior removal order without considering discretionary nature of relief); *Yuen Jin v. Mukasey*, 538 F.3d 143, 161 n.1 (2d Cir. 2008) (Sack, J., concurring) (noting that the determination of whether an immigration benefit gives rise to a constitutionally protected interest is not necessarily settled simply because the benefit is “discretionary”).

<sup>150</sup> For example, applications for adjustment of status almost always involve an exercise of discretion. See *supra* note 25 and accompanying text.

process protection in the discretionary immigration context is unwarranted.

In *Connecticut Board of Pardons v. Dumschat*, the plaintiff brought a due process challenge to the state Board of Pardons' process for commuting prison sentences, and the Court concluded that the plaintiff's claim failed because "[a] constitutional entitlement cannot 'be created . . . merely because a *wholly and expressly* discretionary state privilege has been granted generously in the past.'"<sup>151</sup> In *Dumschat*, the Board's discretion was truly unfettered: The statute conferring its authority contained no guidance or limiting principles.<sup>152</sup> In contrast, while executive officials admittedly retain some discretion to administer immigration laws, the INA still contains considerable, meaningful guidance for administering the statute and is *not* a blank check of "unfettered discretion."<sup>153</sup> The INA itself, as well as BIA precedent and federal case law, limits agency discretion in a number of ways.

For example, while adjustment of status is committed to the Attorney General's discretion, the INA also limits that discretion: The Attorney General may only adjust the status of certain categories of immigrants who make an application, are eligible for a visa, and are admissible for permanent residence.<sup>154</sup> In addition, the BIA has specified "numerous factors to be considered" when determining whether to grant discretionary relief.<sup>155</sup> Federal courts have also required immigration adjudicators to explain their discretionary decisions in order to ensure compliance with applicable law.<sup>156</sup> BIA precedent further limits agency discretion, as explained above, by requiring that evi-

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<sup>151</sup> 452 U.S. 458, 465 (1981).

<sup>152</sup> *See id.* at 460 (quoting the relevant Connecticut statute, which gives the Board of Pardons "authority to grant pardons, conditioned or absolute, for any offense against the state at any time").

<sup>153</sup> *Cf. id.* at 466.

<sup>154</sup> *See* 8 U.S.C. § 1255(a).

<sup>155</sup> *Matter of Edwards*, 20 I. & N. Dec. 191, 195 (B.I.A. 1990) (listing factors).

<sup>156</sup> *E.g.*, *Mattis v. Immigr. & Naturalization Serv.*, 774 F.2d 965, 968 (9th Cir. 1985) ("We have consistently required the BIA to state its reasons and show proper consideration of all factors when weighing equities and denying relief."). Some courts have called into question this explanation requirement in light of IIRIRA's jurisdiction-stripping provisions, discussed above, concluding that to require explanation would invite abuse of discretion review, in contravention of IIRIRA. *See, e.g.*, *Marrakchi v. Napolitano*, 494 F. App'x 877, 883–84 (10th Cir. 2012). However, in light of the continuing principle, even after IIRIRA, that immigration officials have "no discretion to make a decision that is contrary to law," it is unclear how a court would be able to ensure the official has followed the law if there is no record of the basis for the discretionary decision. *Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir. 2003); *see also* 8 U.S.C. § 1252(a)(2)(D) ("Nothing in [this section] which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law . . .").



dence relied upon in immigration proceedings meet minimum standards of fundamental fairness in order to comport with due process,<sup>157</sup> and federal courts have reversed immigration officials' discretionary decisions where they violated this precedent.<sup>158</sup>

USCIS action also differs from the discretionary police action at issue in *Town of Castle Rock v. Gonzales*, another Supreme Court case standing for the principle that an entitlement is not constitutionally protected "if government officials may grant or deny it in their discretion."<sup>159</sup> In *Castle Rock*, the Court concluded that the plaintiff did not have a protected right to police enforcement of a restraining order, despite mandatory-sounding language in the relevant state statute. The Court relied on the "deep-rooted . . . common sense that all police officers" are entitled to discretion regarding how to enforce laws.<sup>160</sup> However, there is no similarly "deep-rooted" tradition to give immigration officials discretion to act contrary to "seemingly mandatory legislative commands."<sup>161</sup> The very existence of the APA, which allows courts to "hold unlawful" agency action as "an abuse of discretion,"<sup>162</sup> belies the argument that agency officials have the same "deep-rooted" level of discretion afforded to police officers.<sup>163</sup>

Further, the liberty interests protected by the Fifth Amendment are implicated by USCIS decisions to grant or deny affirmative immigration applications. In *Board of Regents v. Roth*, the Supreme Court recognized that where a decisionmaker's choice to deny an individual a discretionary entitlement "imposed on him a stigma or other disability," the protections of the Due Process Clause might be implicated.<sup>164</sup> In this circumstance, USCIS's decision to deny an application does impose serious "disabilities" on affirmative applicants. For instance, the increasingly closely-linked nature of affirmative proceedings and deportation means that the immense interests at stake in

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<sup>157</sup> See *supra* notes 112–16 and accompanying text.

<sup>158</sup> *E.g.*, *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 713 (6th Cir. 2004) (vacating immigration judge's order of removal because judge improperly relied on information contained in an uncorroborated arrest record, in violation of BIA precedent).

<sup>159</sup> 545 U.S. 748, 756 (2005).

<sup>160</sup> *Id.* at 761.

<sup>161</sup> *Id.* (describing the nature of law enforcement discretion).

<sup>162</sup> 5 U.S.C. § 706(2)(A).

<sup>163</sup> See also *Avila-Ramirez v. Holder*, 764 F.3d 717, 723–25 (7th Cir. 2014) (reversing BIA's decision to deny discretionary relief where agency ignored its own binding precedent).

<sup>164</sup> 408 U.S. 564, 573–74 (1972) (contemplating that if the state, in refusing to rehire the respondent, had invoked "regulations to bar [him] from all other public employment," he would be entitled to a full prior hearing).

removal proceedings<sup>165</sup> are also implicated by affirmative proceedings. Although deportation is not an automatic result of a denial of an immigration application,<sup>166</sup> it is increasingly likely that a denial will be the first step in a path toward deportation, either because USCIS directly refers an affirmative applicant who has been denied to deportation proceedings or because the immigrant begins to accrue “unlawful presence” as a result of the denial.<sup>167</sup> USCIS decisions also implicate many other aspects of an immigrant’s livelihood and security which depend on her immigration status, like her ability to work, travel, and access critical government assistance.<sup>168</sup>

The Supreme Court has also indicated at least some willingness to recognize constitutional protections in the immigration context, even where the legal analysis does not fit precisely within the confines of prior precedents, in recognition of the serious nature of the interests at stake. For instance, in *Padilla v. Kentucky*, the Supreme Court recognized that criminal defendants have a Sixth Amendment right to the effective assistance of counsel regarding deportation consequences of conviction, even if deportation is technically a civil, rather than criminal, sanction.<sup>169</sup> And in *Zadvydas v. Davis*, the Court reiterated the principle that although Congress has “plenary power” over immigration law, “that power is subject to important constitutional limitations,”<sup>170</sup> rejecting the government’s reading of a statute which would have allowed the Attorney General to detain immigrants subject to deportation orders indefinitely, even if that was what the statute “literally” said.<sup>171</sup> Admittedly, both *Padilla* and *Zadvydas* dealt directly with the rights of immigrants facing deportation and detention, where a clear liberty interest was at stake—an interest that is only indirectly implicated by affirmative immigration proceedings—but nonetheless, they suggest that the Court gives special care to constitutional claims in the immigration context.<sup>172</sup>

Finally, in the deportation context, some courts have recognized an important distinction between the right to seek relief and the right

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<sup>165</sup> *E.g.*, *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring) (“A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death.”).

<sup>166</sup> In contrast with the result of a removal proceeding, in which deportation is the immediate consequence.

<sup>167</sup> *See supra* note 32 and accompanying text.

<sup>168</sup> *See supra* notes 33–35 and accompanying text.

<sup>169</sup> 559 U.S. 356, 365–66 (2010).

<sup>170</sup> 533 U.S. 678, 695 (2001).

<sup>171</sup> *Id.* at 689.

<sup>172</sup> *Cf. Padilla*, 559 U.S. at 365 (“Whether that distinction [between direct and collateral consequences of a criminal conviction] is appropriate is a question *we need not consider* in this case because of the *unique nature* of deportation.” (emphasis added)).

to relief itself, holding that the denial of the right to *seek* discretionary relief can be a fundamental procedural error.<sup>173</sup> This distinction is relevant in the affirmative immigration context as well. Just as a fundamental procedural error occurs where an immigrant facing deportation is denied the opportunity to seek discretionary relief, it is also a fundamental error to deprive an affirmative applicant of a constitutionally adequate procedure to seek discretionary relief. Put another way, the challenge is to the *process* for seeking relief, not the ultimate relief decision itself.<sup>174</sup>

Therefore, because the interest at stake in affirmative immigration proceedings is more than a “unilateral hope” of receiving a favorable benefit<sup>175</sup> and implicates many significant liberty interests, courts should recognize that the Fifth Amendment requires the government to provide constitutionally adequate procedures for immigrants affirmatively applying for immigration status.

## 2. USCIS’s Policy Deprives Applicants of Due Process

The next step in the due process analysis is determining whether USCIS has deprived individuals of their interest in affirmative immigration applications without due process. *Mathews v. Eldridge*<sup>176</sup> sets forth the framework for the second part of this analysis. According to *Mathews*, deciding what process is constitutionally due in any given situation requires a “flexible” balancing test.<sup>177</sup> Under this test, courts must balance 1) the relevant private interests and 2) the risk of an erroneous deprivation under existing procedures and the probable value of additional or alternative procedures against 3) the government interests and burdens involved.<sup>178</sup>

As explained more fully below, USCIS’s current policy deprives affirmative applicants of due process under the *Mathews* framework because it allows the agency to deny applications based on unreliable information contained in police and arrest reports without any real opportunity to contest those findings. In order to remedy this procedural error, I propose that, rather than require USCIS to provide affirmative immigration applicants with *additional* procedure, like evi-

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<sup>173</sup> See, e.g., *United States v. Copeland*, 376 F.3d 61, 72 (2d Cir. 2004) (“[B]ecause the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error.”).

<sup>174</sup> Cf. *supra* notes 136–37 and accompanying text (making a similar argument to overcome IIRIRA’s jurisdiction-stripping provision in the APA context).

<sup>175</sup> Cf. *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

<sup>176</sup> 424 U.S. 319 (1976).

<sup>177</sup> *Id.* at 334 (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))).

<sup>178</sup> *Id.* at 335.

dentiary hearings (the relief requested in *Mathews*), USCIS should adopt an *alternative* procedure: namely that it be prohibited from requesting police reports and arrest records from applicants altogether and instead be required to limit its consideration of an applicant's criminal history, if at all, to certificates of disposition.<sup>179</sup> Below, I analyze each of the *Mathews* factors to assess this proposed alternative procedure.

a. Private Interests

According to *Mathews*, both the degree and length of the potential wrongful deprivation are critical factors to consider in weighing the nature of the private interest at stake.<sup>180</sup> With regard to degree, as explained at length above, the private interests implicated by USCIS's adjudication of affirmative immigration applications are substantial. Failure to obtain an immigration status or benefit can cause a cascade of collateral consequences,<sup>181</sup> and at worst, could even lead to deportation.<sup>182</sup> Like the welfare benefits at issue in one of the Court's seminal procedural due process cases, *Goldberg v. Kelly*, immigration status relates directly to "the means to obtain essential food, clothing, housing, and medical care" and may "guard[ ] against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity."<sup>183</sup> As to the length of deprivation, the ability to appeal a USCIS determination is not certain,<sup>184</sup> and for those decisions that *may* be appealed, a speedy resolution is not guaranteed.<sup>185</sup> Furthermore, while the appeal, if any, is pending, the petitioner is left without alternative options.<sup>186</sup>

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<sup>179</sup> This alternative procedure would essentially act as the imposition of an evidentiary rule.

<sup>180</sup> *Mathews*, 424 U.S. at 341.

<sup>181</sup> See *supra* notes 32–35 and accompanying text.

<sup>182</sup> See *supra* notes 12–18 and accompanying text.

<sup>183</sup> 397 U.S. 254, 264–65 (1970).

<sup>184</sup> See *supra* note 39 and accompanying text (explaining that not all USCIS decisions are appealable).

<sup>185</sup> The AAO—which handles the majority of appeals of USCIS determinations—"strives to complete its appellate review within 180 days." See *AAO Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/administrative-appeals/aao-processing-times> (last updated Oct. 5, 2020). However, not all appeals are completed within that time frame. See *id.* (listing appeal completion rates).

<sup>186</sup> As compared to the disabled workers in *Mathews*, who might have been able to access private resources or other forms of government assistance, 424 U.S. 319, 342 (1976), immigrants denied immigration status have no other way to secure that status or its attendant benefits, like employment authorization, welfare benefits, or protection from deportation.

## b. Risk of Error and Value of Additional Safeguards

In considering the reliability of existing procedures and the corresponding risks of error, *Mathews* instructs that “the nature of the relevant inquiry” is “[c]entral.”<sup>187</sup> For example, if the relevant decision turns on “routine, standard, and *unbiased* . . . reports,”<sup>188</sup> the necessity of additional procedural safeguards is reduced. However, where the relevant inquiry involves “issues of witness credibility and veracity” that are critical to the ultimate decision,<sup>189</sup> “written submissions are a wholly *unsatisfactory* basis for decision. . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”<sup>190</sup>

Witness credibility and veracity are directly at issue in affirmative immigration proceedings in which USCIS seeks to rely on police reports or arrest records to make its decision: If the information contained in those documents is true, it might weigh as an adverse factor against the applicant, but if it is false or inaccurate, the information is irrelevant. Unlike the medical reports relied upon in *Mathews*, police reports and arrest records are particularly unreliable as evidence of wrongdoing.<sup>191</sup> In addition, unlike in the removal context, petitioners applying for affirmative relief from USCIS do not have a pre-determination opportunity to make their case orally before a decisionmaker. Instead, their only option is to submit a written explanation to a faceless agency in an attempt to explain why an arrest record or police report should not be weighed against them. Therefore, affirmative immigration proceedings appear to be exactly the type of inquiry where additional procedural safeguards are needed.

## c. Government Interests and Burdens

The final prong of the *Mathews* test entails evaluating the administrative and other societal costs of the proposed additional or alternative procedures in light of the function of the inquiry.<sup>192</sup> Because the alternative procedure this Note proposes is to restrict the information that USCIS may rely on in making its determinations, rather than to

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<sup>187</sup> *Id.* at 343.

<sup>188</sup> *Id.* at 344 (emphasis added).

<sup>189</sup> *Id.* at 343–44 (explaining the Court’s opinion in *Goldberg v. Kelly*).

<sup>190</sup> *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (emphasis added).

<sup>191</sup> *See supra* Section II.A.

<sup>192</sup> *Mathews*, 424 U.S. at 335, 347.

require an evidentiary hearing,<sup>193</sup> its adoption is unlikely to require significant additional fiscal or administrative costs. In fact, the proposed procedure could actually reduce administrative costs by decreasing the number of documents that a USCIS officer would need to read and assess when adjudicating an application.

However, fiscal and administrative costs are not the only factors relevant to the government's interest. Other considerations, based on the function of the inquiry, must also be considered. In this case, the government's interest in the "efficient administration of the immigration laws" is implicated, as well as the fact that "control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature."<sup>194</sup> Additionally, since the September 11, 2001 attacks, the executive branch has increasingly drawn a link between immigration policy and national security.<sup>195</sup> Therefore, the government might argue that USCIS cannot and should not be restricted in the information it considers when adjudicating immigration applications.

However, the fact that for many years—including the years following 9/11—USCIS was satisfied with certificates of disposition and did not request underlying documents<sup>196</sup> undermines the argument that police reports and arrest records are necessary for the "efficient administration of the immigration laws" or the prioritization of national security. Furthermore, in light of the fact that the BIA has *already* determined that uncorroborated police reports and arrest records should not be given substantial weight even where the immigrant is entitled to a hearing (i.e. in the deportation context), USCIS is not losing much where, in adjudicating applications on the basis of written evidence alone, it is prohibited from considering those documents at all.<sup>197</sup> Finally, a proposal to restrict USCIS's access to police

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<sup>193</sup> Requiring an evidentiary hearing might also satisfy due process. However, because hearings would entail significant administrative burdens on both the government and immigrants, I advocate for limiting USCIS's ability to rely on certain records instead.

<sup>194</sup> *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

<sup>195</sup> See *National Security Threats—Chain Migration and the Visa Lottery System*, *supra* note 103.

<sup>196</sup> While there is no specific data available—at least to the public—regarding when USCIS began to categorically request police reports and arrest records from immigration applicants, anecdotal evidence from immigration attorneys supports the view that these requests significantly multiplied following President Trump's election, leading to the nearly-uniform policy in place today. Records obtained in FOIA litigation, like that described in note 27, *supra*, will eventually provide a clearer picture of the extent of the problem.

<sup>197</sup> I argue that USCIS should be precluded from considering police reports and arrest records altogether—rather than only relying on them when they have been corroborated—due to the nature of the affirmative immigration process. Because USCIS adjudications do not involve evidentiary hearings, and USCIS relies upon the immigrant applicant herself to

reports and arrest records when adjudicating immigration petitions does not leave USCIS without a plethora of other (more reliable) information upon which to base its decisions.<sup>198</sup>

Ultimately, the crux of the procedural due process inquiry is that “the procedures be tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be heard.’”<sup>199</sup> Here, immigrant applicants’ interests in not being deprived of lawful immigration status is substantial, and the risk of error under USCIS’s current policy is great. In contrast, the burdens on the government of an alternative procedure are relatively low. Therefore, the Constitution requires such an alternative procedure in order to ensure that immigrants are not deprived of due process.

### *C. Both APA and Due Process Challenges Are Necessary to Fully Address the Problem*

APA challenges to USCIS’s policy in individual cases and facial attacks to USCIS’s policy under the Due Process Clause are both necessary to adequately address the problem of USCIS’s reliance on police reports and arrest records. APA challenges will ensure that those persons directly affected by USCIS’s policy have an immediate avenue to challenge its application in their individual cases. In contrast, a facial due process challenge might be more difficult and take longer, especially considering the nature of current law regarding whether a discretionary immigration benefit is an interest protected by the Due Process Clause.

However, it is important to pursue a facial due process attack because, unlike APA challenges, a direct due process challenge to USCIS’s policy is not dependent on BIA rules and priorities: While in theory the success of an APA challenge could be dismantled by the Attorney General<sup>200</sup> or a change in BIA precedent, the requirements of due process under the Constitution are enduring. Even if a future executive reverses USCIS’s current policy, there is nothing currently preventing a return to the policy in subsequent administrations—in essence, USCIS’s policy is currently at the whim of the executive

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supply all necessary information, allowing the use of police reports and arrest records if they were corroborated would add additional costs to the process (the time required for USCIS to gather corroborating evidence and sift through more information).

<sup>198</sup> See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS: FORM I-485 (2019) (requiring petitioner to answer eighteen pages of detailed personal questions).

<sup>199</sup> *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970)).

<sup>200</sup> The Attorney General has power to overrule BIA precedent. See 8 C.F.R. § 1003.1(d)(7), (h) (2020).

branch, unless constitutional limits are imposed by the federal courts. In addition, while an APA challenge is more likely to be successful in *individual* cases, a successful due process challenge would alter USCIS's policy across-the-board.

### CONCLUSION

While scholars have long criticized the lack of procedural protections in deportation proceedings (and rightly so), this Note has demonstrated that increased attention must also be paid to the procedure afforded to immigrants in *affirmative* proceedings. Especially as the two immigration regimes—deportation/removal and affirmative relief—become increasingly hard to disentangle, to call for increased protections in one but not the other is misguided.

An especially egregious example of the consequences of the lack of protections in affirmative proceedings is USCIS's increasingly common reliance on police reports and arrest records to form the basis of denials for immigration status or benefits. Although reliance on such documents is often unacceptable in other types of court proceedings, and in other contexts federal agencies as well as state and local governments have begun to acknowledge their unreliability, immigration agencies have taken the position that police reports and arrest records may be admitted as evidence in immigration proceedings, as long as their use is "fundamentally fair." This admission is especially problematic in the affirmative immigration context due to the difficulties of appealing decisions and the severe consequences that can result from a denial of an application for an immigration benefit or relief.

It is clear that change is needed. We should not continue to subject immigrants like Jessica to an unfair process that excludes them based on information contained in biased, unreliable documents. Therefore, this Note has argued that USCIS's policy can and should be challenged in the courts. The policy is a violation of law under the Administrative Procedure Act, and it deprives applicants of a constitutionally adequate process to affirmatively apply for immigration status in violation of the Due Process Clause. While proponents of USCIS's policy might levy arguments as to why courts should not reach the merits on either an APA or a due process claim, this Note has demonstrated why these arguments are unconvincing. Instead, once courts reach the merits of the legal challenges to USCIS's policy, the law supports finding that the policy cannot withstand judicial scrutiny.